UPPANDAVE & ANOR. v. PUBLIC PROSECUTOR.

[A. Cr. J. (Hepworth J.) February 6, 1958]

[Malacca — Criminal Miscellaneous Application No. 3 of 1957]

Criminal procedure — Complainant — Bond to keep peace — Case to show cause — Complainant's right to appeal — Criminal Procedure Code (Cap.21), ss.74 and 302.

Before a complainant in a case is ordered to enter into a bond to keep the peace under section 74 of the Criminal Procedure Code (Cap. 21), the provisions of that section must be complied with in that he must first be called upon to show cause why such an order should not be made. The Court must read to him the evidence upon which it is decided to call upon him to show cause, and give him an opportunity, if he so wishes, to recall any witness for the purpose of cross-examination.

Whether the case to show cause proceeds as part of the case out of which it has arisen or as a separate proceeding, the complainant has a right of appeal under section 302 of the Criminal Procedure Code (Cap. 21).

Cases referred to:—

(1) *Koay Ban Siew v. Public Prosecutor* (1948) M.L.J. 54.

(2) *Soon Chee Kong v. Public Prosecutor* (1951) M.L.J. 86.

(3) *In re Puteh* 9 S.S.L.R. 78.

(4) *Narayanasamy v. R.* (1941) M.L.J. 120.

MISCELLANEOUS CRIMINAL APPLICATION.

H. B. Ball for the applicants.

L. A. Massie (Federal Counsel) for the respondent.

Hepworth J.: — Certain persons were convicted in the Sessions Court, Malacca, of the offence of rioting under section 147 of the Penal Code and were fined $50 each and each accused was ordered to execute a bond for keeping the peace for 6 months in the sum of $100. At the same time the learned President ordered "P.W.3 and P.W.4 (the complainants) to execute a similar bond for 6 months".

The complainants in the case referred to endeavoured to give Notice of Appeal but this was rejected on the ground that the order of binding over made against the complainants was not made in a criminal case to which the complainants were parties and that accordingly they did not have a right of appeal under section 302 of the Criminal Procedure Code.

In correspondence that subsequently took place between the Solicitors for the complainants and the learned President, the learned President stated that in binding the complainants over he was acting under the provisions of section 74 of the Criminal Procedure Code. It is apparent from the Record that the provisions of section 74 of the Criminal Procedure Code were not complied with in that the complainants were not called upon to show cause why such an order should not be made.

The authority, the judgment of the Court of Appeal in the case of *Koay Ban Siew v. Public Prosecutor*[1], relied upon by the learned President for rejecting the Notice of Appeal on the ground that the complainants were not parties, does not in my view justify nis action in this case, nor can any help be derived from other authorities which also at first sight appear to be on the point. In *Koay Ban Siew's case* the appellant was the owner of a junk which was forfeited as having been used for the commission of an offence against the Customs Enactment, 1936. It was held in that case that as the appellant had not been a party to the case in the first instance (he took no part whatever in the case and was not even a witness) he had no right of appeal from the order made, the matter was not therefore before the Court and the appeal was dismissed. In 1951, in the case of *Soon Chee Kong v. Public Prosecutor*[2], which was a case which came before the Court of Appeal as a result of a certificate given by the Public Prosecutor under section 34 of the Courts Ordinance, 1948, asking the Court to determine whether a Magistrate, or a Judge of the Supreme Court on an appeal from a Magistrate might, when refusing an order of forfeiture under section 106 of the Enactment, order that the goods should be released, and thereby preclude the operation of section 108 of the Enactment, it was held that the power to order release of goods liable to forfeiture was clearly and unequivocally vested only in the executive. The action open to the appellant in *Koay Ban Siew's case* was therefore to put up a case to the executive for the release of the junk.

In the case of *In re Puteh*[3] it was held that as no right of appeal was given by the Oaths Ordinance (Cap.15) an order passed under its provisions was not appealable and that the whole of the provisions of section 11 of the Ordinance were outside the scope of the Criminal Procedure Ordinance, 1900. This decision was followed in *Narayanasamy v. The King*[4] in which the appellant was a witness in a prosecution and at the

close of the case the Magistrate called upon the appellant to show cause why he should not be punished for contempt of court committed in *facie curiae* by giving false evidence. He was convicted and on appeal it was held, following *In re Puteh,* that in such a case an appeal does not lie and the Supreme Court has no power to revise the conviction or sentence. During the course of his judgment McElwaine, C.J., said:—

"I am inclined to think that contempt in *facie curiae* by giving false evidence is a criminal matter, but even if it is it may well be that s. 302 is not intended to cover such a case as the present. In addition to the inference Braddell, J. found in the provision that summary fines must be reported to the Attorney-General, which can only be with a view to executive action which would hardly be necessary if an appeal lay, I would refer to sections 279-385 dealing with other criminal offences which may be dealt with as contempts when committed in *facie curiae.* An appeal is given by s. 384 which would not be necessary if the Legislature had considered the matter covered by s. 302."

It would appear that in these circumstances also the remedy of the person aggrieved is limited to Executive action.

The facts of these cases are essentially different from the facts in the present case. *Koay Ban Siew's case* can be distinguished from the present case because, firstly, in the present case the complainants were themselves witnesses for the prosecution, and secondly, in acting under section 74 of the Criminal Procedure Code it was incumbent upon the learned President to call upon the complainants to show cause why an order should not be made which was not so under the Customs Enactment, 1936. The remedy of the owner of the junk was as I have said to make out a case to the Executive for the return of the forfeited junk.

The cases of *In re Puteh*[3] and *Narayanasamy v. The King*[4] can be distinguished from the present case in that the Oaths Ordinance was held to be outside the scope of the Criminal Procedure Ordinance, 1900, and the Criminal Procedure Code respectively (the relevant provisions of which were substantially similar). In the present case the action taken by the learned President was by virtue of the powers contained in the Criminal Procedure Code (s.74), that is the same legislation giving a right of appeal from which it follows that any right of appeal is governed by section 302.

I can find no other authority which has any bearing on the question.

Section 74 reads as follows:—

"74.—(1) If during or after the trial of a case the Court is of opinion that the conduct of a complainant is or has been such that it is necessary to call upon him to show cause why he should not enter into a bond to keep the peace for such period not exceeding six months as the Court thinks fit to fix, the Court may summarily call upon him to do so.

(2) The evidence upon which the Court decides to call upon a person to show cause under this section shall be read to the person so called on, but it shall not be necessary to recall any witness unless the person called upon desires to cross-examine the witness.

(3) The case to show cause under this section may, as the Court sees fit, proceed as either part of the case out of which it has arisen or as a separate proceeding."

It will be seen that the complainants must be called upon to show cause, that is to say, they must be called upon to answer the accusation that it is necessary in order to ensure that they keep the peace that they should enter into a bond so to do for a specific period. The Court must read to them the evidence upon which it has decided to call upon them to show cause and the complainants have a right to recall any witness for the purpose of cross-examining that witness. This right in itself suggests that they are parties. Sub-section (3) contemplates that this proceeding or matter may proceed either as part of the case out of which it has arisen or as a separate proceeding. This is presumably a matter of procedural convenience, but it seems to me that if the matter takes place as a separate proceeding, the complainants must *ipso facto* be parties to that proceeding. If this is so it would be most unreasonable to consider that if the proceeding takes place as part of the case out of which it has arisen the complainants are not parties and in my view in such circumstances the proceedings comprise a case within a case to which the complainants are parties.

Accordingly I hold that the complainants have a right of appeal under section 302 of the Criminal Procedure Code.

Order accordingly.

Solicitors: *Allen & Gledhill.*

BUILDING & ESTATES LTD. v. A. M. CONNOR

[O. C. J. (Whyatt C.J.) December 19, 1957]

[Singapore — Suit No. 1128 of 1956]

Contract — Building contract — Lump sum contract — Work defective and quality inferior — Right to repudiate — Refusal to pay balance on completion — Doctrine of substantial performance.